

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JEMARCUS WASHINGTON, )  
vs. )  
Plaintiff, )  
vs. )  
RODNEY WILSON, et al., )  
Defendants. )  
CIVIL NO. 09-cv-493-DRH

**MEMORANDUM AND ORDER**

**HERNDON, Chief Judge:**

Plaintiff Jemarcus Washington, an inmate in the St. Clair County Jail at the time of the alleged events, brings this action for deprivations of his constitutional rights pursuant to 42 U.S.C. § 1983. This case is now before the Court for a preliminary review of the amended complaint (Doc. 4) pursuant to 28 U.S.C. § 1915A, which provides:

(a) **Screening.**— The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

**(b) Grounds for Dismissal.**— On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

- (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
- (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A. An action or claim is frivolous if “it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Upon careful review of the complaint and any supporting exhibits, the Court finds it appropriate to exercise its authority under

§ 1915A; portions of this action are subject to summary dismissal.

**FIRST AMENDED COMPLAINT**

Washington states that in June 2009, he was held in the St. Clair County Jail. On June 25, he was woken by barking dogs, and officers directed detainees to come out of the cell block. An unidentified officer placed Washington into handcuffs; Defendant Rodney Wilson then assaulted Washington with kicks before slamming his head into a brick wall. Washington alleges that Defendants Clayton, Tripplet, Blackburn, Scott, Tim, and Wright all witnessed this assault, yet none of them took measures to intervene. Blackburn then took Washington to the medical office, where another officer took photos of his injuries. Washington was given two shots, and he complained to Defendants Page and Rodriguez about vision problems and pain. Washington was then returned to a cell, where he overheard Wilson boasting of his assault on Washington. Washington wrote complaint forms addressed to Defendants Scott and McLaurin about this situation, including his need for medical treatment; he alleges that he was not provided with adequate pain medication or medical attention for his injuries.

Following his recitation of these facts, Washington presents three enumerated counts as basis for relief, as discussed below.

**COUNT 1**

Washington's first claim is solely against Wilson for use of excessive force. The intentional use of excessive force by prison guards against an inmate without penological justification constitutes cruel and unusual punishment in violation of the Eighth Amendment and is actionable under Section 1983. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *DeWalt v. Carter*, 224 F.3d 607, 619 (7<sup>th</sup> Cir. 2000). “[W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether

force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*, 503 U.S. at 6-7. An inmate seeking damages for the use of excessive force need not establish serious bodily injury to make a claim, but not “every malevolent touch by a prison guard gives rise to a federal cause of action. . . . [the] prohibition of ‘cruel and unusual’ punishment necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’” *Id.* at 9-10; *see also Outlaw v. Newkirk*, 259 F.3d 833, 837-38 (7<sup>th</sup> Cir. 2001).

Applying these standards to the allegations against Wilson, the Court is unable to dismiss this excessive force claim at this time.

## **COUNT 2**

Washington next asserts that Defendants Tim, Blackburn, Scott, Tripplet, Wright and Clayton merely stood by and watched Wilson during the events alleged in Count 1, and that these Defendants are equally as liable for his injuries due to their failure to intervene. The Seventh Circuit has examined this issue as it pertains to police officers who fail to intervene when a fellow officer exceeds his authority, and they stated:

We believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge. That responsibility obviously obtains when the nonfeasor is a supervisory officer to whose direction misfeasor officers are committed. So, too, the same responsibility must exist as to nonsupervisory officers who are present at the scene of such summary punishment, for to hold otherwise would be to insulate nonsupervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.

*Byrd v. Brishke*, 466 F.2d 6, 11 (7<sup>th</sup> Cir. 1972); *see also Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 477 (7<sup>th</sup> Cir. 1997); *Yang v. Hardin*, 37 F.3d 282, 285 (7<sup>th</sup> Cir. 1994) (collected cases);

*Archie v. City of Racine*, 826 F.2d 480, 491 (7<sup>th</sup> Cir. 1987).

Accordingly, the Court is unable to dismiss any portion of Count 2 at this time.

### **COUNT 3**

Washington's final claim is that Defendants Justus, Scott, and McLaurin had a legal duty to protect him from injury, and that they failed to protect him from harm at the hands of Wilson. Thus, he argues that they are liable for his injuries. This theory is in direct conflict with the well-established rule that "public employees are responsible for their own misdeeds but not for anyone else's." *Burks v. Raemisch*, 555 F.3d 592, 596 (7<sup>th</sup> Cir. 2009). *See also Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7<sup>th</sup> Cir. 2001) (doctrine of respondeat superior does not apply to § 1983 actions). Essentially this is a claim of negligence, but a defendant cannot be held liable under § 1983 for negligence. *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7<sup>th</sup> Cir. 1995). Accordingly, Count 3 will be dismissed from this action.

### **OTHER DEFENDANTS**

Washington lists Brandy Page and Barbara Rodriguez as defendants in this action, and he mentions them within the context of his factual allegations. However, he does not make any specific claim against either of them in any of his three counts, and "a plaintiff cannot state a claim against a defendant by including the defendant's name in the caption." *Collins v. Kibort*, 143 F.3d 331, 334 (7<sup>th</sup> Cir. 1998). Therefore, Page and Rodriguez will be dismissed from this action.

### **APPOINTMENT OF COUNSEL**

Washington also requests that the Court appoint him counsel (Doc. 7). There is no absolute right to appointment of counsel in a civil case. *Cook v. Bounds*, 518 F.2d 779 (4<sup>th</sup> Cir. 1975); *Peterson v. Nadler*, 452 F.2d 754 (8<sup>th</sup> Cir. 1971). When presented with a request to appoint counsel,

the Court must make the following inquiries: "(1) has the ... plaintiff made a reasonable attempt to obtain counsel or effectively been precluded from doing so and (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself." *Pruitt v. Mote*, 503 F.3d 647, 854-55 (7<sup>th</sup> Cir. 2007). With regard to the first step of the inquiry, there is no indication at all whether Washington has attempted to obtain counsel or been effectively precluded from doing so. Therefore, his motion for the appointment of counsel is **DENIED**, without prejudice.

**DISPOSITION**

**IT IS HEREBY ORDERED** that **COUNT 3** is **DISMISSED** from this action with prejudice. Further, Defendants **PAGE, RODRIGUEZ, JUSTUS** and **McLAURIN** are **DISMISSED** from this action with prejudice. Plaintiff is advised that, within the Seventh Circuit, dismissal of these claims and defendant count as a strike for purposes of § 1915(g). *See George v. Smith*, 507 F.3d 605, 607-08 (7<sup>th</sup> Cir. 2007); *Boriboune v. Berge*, 391 F.3d 852, 855 (7<sup>th</sup> Cir. 2004).

The Clerk is **DIRECTED** to prepare Form 1A (Notice of Lawsuit and Request for Waiver of Service of Summons) and Form 1B (Waiver of Service of Summons) for Defendants **WILSON, WRIGHT, TRIPPLET, CLAYTON, SCOTT, BLACKBURN** and **TIM**. The Clerk shall forward those forms, USM-285 forms submitted by the Plaintiff, and sufficient copies of the complaint to the United States Marshal for service.

The United States Marshal is **DIRECTED**, pursuant to Rule 4(c)(2) of the Federal Rules of Civil Procedure, to serve process on Defendants **WILSON, WRIGHT, TRIPPLET, CLAYTON, SCOTT, BLACKBURN** and **TIM** in the manner specified by Rule 4(d)(2) of the Federal Rules of Civil Procedure. Process in this case shall consist of the complaint, applicable forms 1A and 1B, and this Memorandum and Order. For purposes of computing the passage of time under Rule 4(d)(2), the Court and all parties will compute time as of the date it is mailed by the Marshal, as

noted on the USM-285 form.

With respect to former employees of St. Clair County Jail who no longer can be found at the work address provided by Plaintiff, the County shall furnish the Marshal with the Defendant's last-known address upon issuance of a court order which states that the information shall be used only for purposes of effectuating service (or for proof of service, should a dispute arise) and any documentation of the address shall be retained only by the Marshal. Address information obtained from the County pursuant to this order shall not be maintained in the court file, nor disclosed by the Marshal.

The United States Marshal shall file returned waivers of service as well as any requests for waivers of service that are returned as undelivered as soon as they are received. If a waiver of service is not returned by a defendant within **THIRTY (30) DAYS** from the date of mailing the request for waiver, the United States Marshal shall:

- Request that the Clerk prepare a summons for that defendant who has not yet returned a waiver of service; the Clerk shall then prepare such summons as requested.
- Personally serve process upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure and 28 U.S.C. § 566(c).
- Within ten days after personal service is effected, the United States Marshal shall file the return of service for the defendant, along with evidence of any attempts to secure a waiver of service of process and of the costs subsequently incurred in effecting service on said defendant. Said costs shall be enumerated on the USM-285 form and shall include the costs incurred by the Marshal's office for photocopying additional copies of the summons and complaint and for preparing new USM-285 forms, if required. Costs of service will be taxed against the personally served defendant in accordance with the provisions of Fed. R. Civ. P. 4(d)(2) unless the defendant shows good cause for such failure.

Plaintiff is **ORDERED** to serve upon defendant or, if appearance has been entered by counsel, upon that attorney, a copy of every further pleading or other document submitted for consideration by this Court. He shall include with the original paper to be filed with the Clerk of

the Court a certificate stating the date that a true and correct copy of any document was mailed to defendant or his counsel. Any paper received by a district judge or magistrate judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this cause is **REFERRED** to a United States Magistrate Judge for further pre-trial proceedings.

Further, this entire matter is hereby **REFERRED** to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

Plaintiff is **ADVISED** of his continuing obligation to keep the Clerk and each opposing party informed of any change in his whereabouts during the pendency of this action. This notification shall be done in writing and not later than seven (7) days after a transfer or other change in address occurs. Failure to provide such notice may result in dismissal of this action. *See FED.R.CIV.P. 41(b).*

**IT IS SO ORDERED.**

**DATED: February 11, 2010.**

/s/ DavidRHerndon  
**CHIEF JUDGE**  
**UNITED STATES DISTRICT COURT**